INTERNATIONAL INVESTMENT LAW AND ENVIRONMENTAL PROTECTION

CONFERENCE ABSTRACTS

PLAYING DEFENSE – REINFORCING STATE POLICE POWERS AND THE RIGHT TO REGULATE FOR ENVIRONMENTAL PROTECTION

TED GLEASON

This chapter will focus on evolving State practices concerning attempts to balance regulatory policy space with international investment law, particularly in the context of environmental protection. Investment disputes with environmental components have become commonplace in recent years, and can only be expected to increase as environment regulation evolves in light of issues such as climate change, environmental degradation, and renewable energy, among others. Thus, States have an increased need to preserve their regulatory space to tackle complicated and at times unexpected environmental issues that arise. At the same time, FDI has been highlighted as having the potential to improve the environmental and social conditions of host-states through "clean" technology transfer, and dissemination of socially responsible corporate policies and human rights practices. Accordingly, the purpose of this chapter is to explore how States can attempt to operationalize the right to regulate without diminishing important investment flows that may be required to meet environmental challenges. It will first discuss the police powers doctrine and its importance in the debate concerning the right to regulate. Next, this chapter will address emerging approaches to the right to regulate in "new-generation" IIAs. Specifically, it will attempt to analyze how States can pursue a holistic approach by complementing emerging treaty language limiting claims for indirect expropriation based on measures designed to protect legitimate public welfare objectives by engaging in additional reforms to FET, MFN, and ISDS. Finally, it will discuss the important question of what to do with the grand majority of IIAs, which are "old-generation" agreements negotiated before the current impetus for reform came to a head. The chapter posits that States can be seen converging towards increased preservation of the right to regulate for environmental protection as an element of balance with investor protection, however approaches to preserving regulatory space remain fragmented.

INTERPRETATION OF INVESTMENT TREATIES OVER TIME

URSULA KRIEBAUM

Most tribunals, when interpreting treaties, start by invoking Article 31 of the Vienna Convention on the Law of Treaties (VCLT). At times, tribunals also refer to the supplementary means of interpretation contained in Article 32 of the VCLT. Tribunals have recognized the validity of the rules on treaty interpretation in the VCLT as part of customary international law. This means that these rules are of general application also in respect of treaties concluded before the VCLT's entry into force and independently of whether all parties to a treaty have ratified the VCLT.

Treaty interpretation is particularly relevant in the context of environmental law issues arising in the context of foreign investments since only a small percentage of investment protection treaties contains explicit language concerning protection of the environment. Therefore, it is important to discuss how to interpret treaties with and without explicit reference to environmental concerns. In this context, many aspects of treaty interpretation merit discussion. This contribution will focus on three aspects of interpretation where the time element plays an important role. First, it will deal with the possibility that a term used in a treaty is capable to evolve over time and its role in investment law. Second, it will deal with subsequent state practice that influences the understanding of terms used in investment treaties. Third, it will address the role of case law over time in the interpretation of investment treaties.

DOMESTIC ENVIRONMENTAL LAW CONSIDERATIONS IN INVESTMENT TREATY ARBITRATION: ISSUES OF IDENTIFICATION, ASCERTAINMENT, AND APPLICATION

YULIYA CHERNYKH

A difficult relationship with domestic law is not unknown to investment treaty arbitration. Firstly, domestic law has a versatile role and may appear either as lex causae, or as the law applicable to incidental issues, or as a mere factual circumstance, or above combinations. Secondly, tribunals may misconstrue, misapply, or entirely ignore it. The resulting disconnect has a cost. A failure to adequately consider the role and content of domestic law may undermine the ultimate quality and correction of the decision. For domestic law on environmental protection, such a failure may also erode the State's critical function on its territory in protecting nature against the negative human impact. And while States attempt to compensate for this latter shortcoming by introducing or duplicating environmental considerations directly into international investment treaties, the existing capacity of domestic law shall be wholly and adequately explored in the first place. In addition to the protective function, domestic law on environmental protection is frequently capable of reconciling competing interests, public and private. To ignore this capacity, one has to have good reasons, and these reasons shall not be merely assumed but articulated. By addressing issues of identification, ascertainment, and application of domestic law on environmental protection in investment treaty arbitration, this chapter attempts to guide how tribunals could overcome the disconnect and its consequences.

THE ROLE OF COUNTERCLAIMS IN ADDRESSING ENVIRONMENTAL ISSUES IN INVESTMENT TREATY ARBITRATION: THE EMERGENCE OF ENVIRONMENTAL COUNTERCLAIMS

ALEKSANDER SZOSTAK

Counterclaims involving environmental considerations are increasingly being used in investment treaty arbitration. Such counterclaims provide respondent states with a mechanism to obtain compensation through investment treaty arbitration for environmental damage caused by foreign investors and with a potential tool to safeguard their interests. The right of respondent states to counterclaim is problematic in the context of jurisdiction of investment tribunals and leads to controversy. This is caused by asymmetrical nature of investment protection treaties and distorted balance between rights and obligations of capital importing states and foreign investors. Jurisdictional issues arise particularly in respect to the determination of admissibility of counterclaims as well as the scope of jurisdiction *ratione voluntatis* and *ratione materiae*. This has not prevented respondent states from lodging environmental counterclaims in a number of recent investment treaty arbitrations and from obtaining compensation for environmental damage caused by foreign investors. This chapter considers main jurisdictional obstacles to the adjudication of environmental counterclaims in investment treaty arbitration in light of recent developments in jurisprudence of investment tribunals and treaty drafting practice. In doing so, it provides a critical analysis of such recent developments and contextualizes the considerations in a setting concerning reform of investment protection treaties. Potential implications of such developments for future shape and design of investment protection treaties and investment treaty arbitration are briefly considered. It is argued that treaty drafting practice and approach of investment tribunals to the right of respondent states to counterclaim is developing towards an inclusive and permissive one. This may contribute to the popularization of the use of environmental counterclaims in investment treaty arbitration and rebalance the position of capital importing states vis-à-vis the position of foreign investors.

ENVIRONMENTAL INVESTOR OBLIGATIONS AND SOFT STANDARDS IN INVESTMENT TREATY LAW

JOANNA LAM

The chapter examines how the existing regulatory framework of international investment treaty law (ITL, including investment agreements and investment chapters of trade agreements) approaches the issue of investor obligations in regard to environmental protection. It also scrutinizes what options does ITL offer to counteract environmental transgressions of investors and how they are interpreted by the arbitral practice.

Environmental obligations as part of the duty of compliance with national laws are analyzed, including those which are traditionally oriented at the establishment phase of the investment, as well as those which reach beyond it. Consequently, examples of regulatory solutions introducing duty of national laws compliance for post-establishment phase, as well as the effects of relevant treaty clauses, are discussed in detail. The chapter further turns to substantive investor obligations, incorporated by the ITL instruments, and examines their types and enforceability. This category of investor obligations is approached in the context of the broader debate on possible rebalancing of the asymmetrical character of the international investment regime.

The analysis is further supplemented by the examination of environmental soft standards and CSR clauses, explicitly recommended by a growing number of the newly concluded investment treaties. A typology of such standards is forwarded, followed by a discussion of their effects (with the distinction between the clauses addressed at the states as contracting parties of the treaty, and those which are explicitly aimed at investors and investments). Furthermore, comments are offered on the theory of sustainability as a characteristic of investment, formulated in the context of the discussion on the requirement of 'contribution to economic development' under the ICSID Convention. In concluding remarks, the chapter assesses the existing cluster of treaty standards regarding environmental investor obligations, and offers insights on how this – still relatively modest - repertory is increasingly, albeit by far not uniformly, embraced by the ISDS practice.

PARALLEL OBLIGATIONS AT THE INTERSTATE LEVEL UNDER THE PARIS CONVENTION AND IIAS: CONFLICTING OR COMPLEMENTARY SYSTEMS?

CHIARA GIORGETTI

International Investment Agreements establish standards and address issues relevant to cross-border investments, usually for the purpose of protection, promotion, and liberalization of foreign investments. These treaties normally also grant foreign investors access to international dispute resolution in case of alleged breach of a treaty by the State.

The Paris Agreement targets climate change to strengthen the global response. The Agreement requires States to adopt and develop a domestic framework to meet the climate objectives stated in the treaty. Through "nationally determined contributions", contracting states must put forth their best efforts in achieving climate goals and improve these efforts in the future.

The two international instruments have substantial differences. One requires States to protect foreign investors and their investments. The other require States to enact domestic legal instruments that reduce emissions of greenhouse gases. Are these treaties compatible? Or do they inevitable conflict?

Though many States showed a willingness to participate in the global effort to protect the environment from the threat of climate change, doing so may cause them to harm foreign investors in violation of their international obligations. These investors have threatened to file international investment claims. For example, in 2019 the Netherlands adopted a law prohibiting the use of coal in the production of electricity and planning to phase out the use of coal by 2030. In response to this law, two German companies filed an international investment claim arguing that they would suffer economic harm in contravention of the Dutch international obligations. Is this a preview of the times to come?

An analysis of two instruments' provisions shows that the situation is complex and nuanced, and shows that the two instruments, rather than been in conflict to each other, can mostly be interpreted as complementary.

BUT WILL IT HELP? EFFECTIVENESS OF ENVIRONMENTAL EXCEPTIONS TO THE INVESTMENT PROTECTION IN CETA AFTER THE ECO ORO AWARD

PAWEŁ MARCISZ

The paper discusses the ICSID award in the Eco Oro case and the threats it poses for the investment protection regime the EU is trying to achieve in its new generation investment treaties.

In Eco Oro the arbitral tribunal found that the public welfare exception under the Canada-Colombia Free Trade Agreement does not prevent the investor for claiming compensation when harmed by environmental measures. The paper reconstructs the reasoning behind this conclusion and then investigate whether the reasoning is applicable to the CETA (when it comes to investment protection, being the model for intended future treaties concluded by the EU). More broadly, the paper also tries to establish whether the CETA is prone to other kinds of hostile interpretation lessening its intended level of the protection of the environment.

The paper starts from recalling the general outline of the CETA. Then it proceeds to the CJEU analysis of the environmental exclusions in the CETA, done in the CETA opinion. Next, it discusses the major holdings in the Eco Oro award and puts them against the context of other ICSID dealing with environmental exceptions. After the analysis of various safeguards in the CETA, it is concluded that an interpretation similar to this in the Eco Oro award cannot be plausibly applied to the CETA and, if applied, it is likely to be rejected on appeal. This is chiefly due to institutional, as opposed to substantive, precautions knowingly taken in the CETA by its drafters. These considerations should as well protect the CETA against of other kinds of environmental-unfriendly interpretation.

ISDS UNFRIENDLY TO FRIENDS OF THE COURT? THE EXTENT OF AMICUS CURIAE PARTICIPATION IN ENVIRONMENTAL INVESTMENT DISPUTES

ARMAN MELIKYAN AND LENA HORNKOHL

Amicus Curiae briefs are increasingly becoming an inherent part of the discussions on the legitimacy, transparency and accountability of ISDS. Their significance in mitigating possible clashes between expanding environmental public policies and the international investment protections is mainly met with uncertainty in procedural mechanisms allowing their participation in ISDS proceedings. This casts serious doubts about the impact amicus briefs may have as a friend of a court on environmental matters in the particular case. Nevertheless, it would be unfair to undermine the progress made in recent years in ensuring amicus curiae participation in investor-state disputes, especially in the area of written submissions. This article demonstrates the diversity of arbitral practices and procedures that allow some degree of environmental amicus curiae involvement under different investment arbitration institutions. It scrutinises how amicus participation was shaped through key international instruments and independent investment tribunals. While some elements of amicus participation, such as written submissions, obtained textual stipulation in the form of particular procedural discretion of tribunals, it is by far not the case for access to oral hearings and case documents, which can diminish the quality of amicus submissions. This article also explores whether the current legal-procedural solutions available under different investment treaties and arbitration rules allow third parties, as a friend of the court, to constitute a meaningful middle ground in the interplay between upholding public policy objectives on the one hand and investor protection on the other hand.

Furthermore, increased public participation will raise the transparency of ISDS proceedings, ultimately diminishing some of the legitimacy and accountability concerns largely debated in academic and political circles.

POLLUTING THE SHORES OF THE COSMIC OCEAN: REFLECTIONS ON SPACE AS 'ENVIRONMENT' AND INTERNATIONAL INVESTMENT LAW

GÜNEŞ ÜNÜVAR

Outer space is often treated as an extreme frontier located outside the immediate, terrestrial concerns of humanity, such as the global warming and the contamination of our oceans with plastic, ironically caused by our persistent lack of adequate attention towards environmental protection. This paper challenges this view, and starts by asking the question of whether the outer space and in particular the orbit of Earth can be considered as a part of our planet's environment. If this is the case, how does this consideration affect the rules and principles in international law, applicable to environmental protection and policies? In particular, and in light of the background above highlighting the growing public and private capital invested in space-related endeavors, one point of interest would be the legal framework governing investor-host state relations such as international investment treaties (IIAs). So far, there is only a handful of investor-State arbitration (ISA) cases concerning space activities, all concerning satellite systems. None of these cases concerns state measures aimed at protecting the environment in space. If one categorizes outer space and low Earth orbit as part of our environment, one could then entertain the following questions: how should adjudicators interpret protection principles in IIAs, if states took measures with the pretext of protecting the environment in space, adversely affecting private entities' activities, citing, for example, the risk of accumulating space debris? Could the protection of orbital environment, akin to justifications put forth by states concerning the protection terrestrial or atmospheric environment, be considered to advance legitimate public interests? A plethora of ISA cases concerns states halting activities, cancelling contracts and rendering investments defunct citing environmental concerns. Among sectors affected by these measures are nuclear energy production, fossil fuels, mining, and landfill operations. In a similar vein, states can introduce more regulation concerning orbital activities, impose additional financial and performance obligations for private entities concerning, inter alia, debris mitigation. How would categorizing outer space as environment interact with the current arbitral tendencies and how would they likely be interpreted by arbitral tribunals?